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October 23, 1996

DOCKET FILE COPY ORIGINAL

William F. Caton, Acting Secretary
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1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Re: ET Docket No. 93-62

Dear Mr. Caton:

Yesterday, we filed on behalf of Ameritech Mobile Communications, Inc. its Reply in ET Docket No. 93-62. Unfortunately, due to a copier malfunction, we were unable to provide the full compliment of copies normally called for in Rule making proceedings. We are therefore submitting the additional copies herewith. We have hand served each of the Commissioners with this document, so it will not be necessary for your office to do so. To the extent deemed necessary, we hereby request leave to file these copies separate from the original Reply comments (and any associated waivers). The public interest would be served thereby, since the copier malfunction was due to circumstances beyond our control, and the Commission and the public will benefit from a more complete record in this proceeding.

Thank you for your assistance in this matter.

Sincerely,

John A. Prendergast/mb

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
	)	

To: The Commission

REPLY

Ameritech Mobile Communications, Inc. (Ameritech), pursuant to Rule Section 1.429, hereby replys to the October 8, 1996 Opposition of David Fichtenberg ("Opposition") to Ameritech's Petition For Reconsideration And Clarification ("Petition") in the above-captioned proceeding.[1] Ameritech welcomes the participation of Mr. Fichtenberg in this proceeding, as he and others are playing a valuable role in focusing the Commission on the viewpoint of concerned citizens. As discussed in Ameritech's Petition and October 8, 1996 Comments, Ameritech believes that the Commission should utilize the input of a balanced group of representatives from the industry, the scientific community and others in conducting the ongoing review of RF radiation standards that will take place in the coming years. However, Ameritech must disagree with Mr. Fichtenberg concerning the issue of preemption. As demonstrated below and in Ameritech's Petition, Federal preemption of state and local regulation of radio operations is vital in order for the industry to function under the new RF regulations. A Federal Rule of liability is equally vital. Indeed, the various studies cited by Mr. Fichtenberg only point to the need for a uniform approach to RF regulation, which can only be carried out at the Federal level.

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[1]Mr. Fichtenberg served Ameritech with his Opposition by mail, as required by Rule Section 1.429. Ameritech is submitting this Reply within the period of ten days plus three mailing days prescribed by Rule Sections 1.429 and 1.4.

I. The Commission Should Clarify Its Preemption Of State And Local Regulation Of Radio Operations

The Opposition argues against Ameritech's suggestion that the Commission clearly preempt State and local regulation of radio operation, over and above the Congressional preemption of such regulation in the case of placement, construction and modification of personal wireless services. The Opposition asserts (at page 15) that Congress considered preemption of "operation," but deleted this word from the final language of the Telecommunications Act of 1996 ("the Act") because it consciously decided not to preempt state jurisdiction over radio operations. Moreover, the Opposition asserts that Congress evidenced such intent by allowing state regulation of "the public safety and welfare" in Section 253 of the Act. However, the legislative history of the Act contradicts this interpretation. Rather than deleting the word "operation" from the preemption language of the Act in order to invite state regulation, Congress stated as follows:

> The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

Conference Report, Telecommunications Act of 1996, Report No. 104-458, at 209 (1996) (emphasis added). The above quoted language clearly indicates that Congress recognizes the Commission's plenary authority over the operation of radio facilities, and intends that the FCC continue to exercise this authority without limitation. This language in the Conference Report suggests that the word "operation" was deleted merely because it was superfluous.[2]

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[2]The Commission's plenary authority over radio operations is reflected in the very first sentence of Title III of the Communications Act of 1934, as amended: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; . . ." 47 U.S.C. §301. Section 303 goes on to establish the broad authority of the Commission over all aspects of radio operation, including the power to "assign frequencies for each individual station and determine the power which each station shall use and

Indeed, state and local regulation of radio operation would render meaningless the preemption over placement, construction and modification of these facilities. If state and local authorities can govern how a station operates, the preemption language would amount to a Congressional edict that "you can build your station, but you cannot turn it on." Such outcome would be absurd.[3] In fact, Mr. Fichtenberg's Opposition (at page 13) reflects the danger of State and local interference with the Commission's powers even where Congress has expressly preempted such interference:

> "[I]f as noted above, states and local jurisdictions may more quickly respond to the latest scientific findings, then to that extent the 'placement, construction, and modification' of personal wireless services under state or local jurisdiction would better meet the public interests of those living near such facilities, . . ."

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the time during which it may operate;" 47 U.S.C. §303(c) (emphasis added). Section 303(e) gives the Commission the authority to "regulate the kind of apparatus to be used with respect to its external effects . . ." 47 U.S.C. §303(e) (emphasis added). Other provisions give the Commission the broad power to inspect radio facilities. This language clearly establishes both Federal occupation of the field of RF and explicit Commission authority over radio operations, emissions and regulation of power levels (i.e., the very aspects of radio which are the subject of the RF regulations adopted in ET Docket No. 93-62).

[3]In this regard, the Opposition erroneously argues that preemption decisions on radio operation would have to be implemented "on a case-by-case basis." Opposition at page 13. However, the language in the Conference Report relied on by the Opposition reads as follows:

> Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Conference Report, supra, at 208. The above language indicates that, having preempted State and local regulation over placement, construction and modification of radio facilities (where the regulation is based on RF considerations), Congress intends for the FCC to judge whether RF considerations are a factor in such regulations on a case-by-case basis. Nothing in this language suggests that preemption of State or local regulation over radio operations would have to be done on a case-by-case basis. Instead, the language in the Conference Report concerning the Commission's broad authority over radio operations contradicts this interpretation.

This observation reflects the temptation of State and local jurisdictions to regulate RF matters despite the direct Congressional prohibition in the Act. It is respectfully submitted that the Commission should make its preemption of State and local jurisdiction over radio operation more explicit, to clarify that it has sole authority over such matters.

The Opposition (at page 9) tries to justify state regulation on the basis that "there is uncertainty about what the exposure standard will be." However, there is no such danger of uncertainty. The standard is the one which has been adopted by the Commission, and which may be modified from time to time as part of the Commission's ongoing review of RF radiation issues. The greater danger for uncertainty would arise if every state, county, and municipality were allowed to adopt its own RF regulations.

The Opposition (at pages 10-11) also tries to justify State and local RF regulation because Commission RF standards "do not change as quickly as new scientific information becomes available," whereas "States and local jurisdictions . . . can much more quickly respond as new scientific information becomes available." In essence, the Opposition argues that State and local jurisdiction is needed to prod the Commission into action, because it will not address RF issues on its own. This is a dubious conclusion at best. State and local governments are generally suffering a greater scarcity of resources than the Commission. The greater danger is that such entities will not be able to give serious consideration to scientific studies, and will instead adopt an overly burdensome and erroneous standard based on incomplete information. Because of the alleged speed with which such entities can react to new information, a situation could evolve where at any given time, dozens or even hundreds of RF ordinances may change with each new study that comes down the pipe, even if the study only showed, e.g., the possibility of "warming" at 300 GHz -- a frequency band which has little relevance to the personal wireless services. See Opposition at page 5. This likelihood only

points to the need for a uniform, scientific approach to new RF exposure information at the Federal level, so that research can be focused on the frequency bands and operating conditions relevant to personal wireless services.

These problems associated with State and local regulation underscore the need for preemption. There is a direct conflict with the Federal scheme if such numerous and contradictory regulations are allowed to go forward. Radio licensees cannot operate wide area cellular, paging, and PCS services if they face 50 different state laws and potentially thousands of different county and municipal ordinances, including dozens in a single state. Radio waves do not stop at the State or local boundary. Compliance for such licensee will become impossible.[4] Such dual jurisdiction would allow one State to impose its will on another State. If Connecticut adopts a very restrictive RF standard, licensees in New York, Rhode Island and Massachusetts will be forced to comply with the Connecticut standard, even if those other States have adopted a different RF regulation. Likewise, the City of Pasadena could impose its will on the City of Los Angeles by adopting a more strict RF standard.

For that matter, the States and municipalities could impose their will on the Commission. While the Opposition asks the Commission to consult with the EPA and other Federal agencies to ensure that its RF standard is adequate, it would make little difference what standard the Commission adopted, if licensees must comply with differing State and local regulations as well. Manufacturers of radio equipment likewise cannot do business in the face of many contradictory standards. Thus, there is a direct conflict between State and local RF

[4]While the Opposition indicates that several states already regulate RF, no such state laws are cited therein. Ameritech has not had the opportunity since receipt of the Opposition to survey state laws. However, if such laws have been adopted, and effectively prevent harmful RF exposure, Ameritech does not believe that Mr. Fichtenberg and other parties would be participating so vigorously in this proceeding.

regulation on the one hand and the Federal RF regulation scheme on the other.[5] Unlike the Louisiana Public Service Commission v. FCC case cited by the Opposition (at page 10),[6] RF signals cannot be divided into an intrastate element and an interstate element. Therefore, preemption is necessary.

Mr. Fichtenberg disputes the Commission's ability to preempt regulations dealing with the operation of radio facilities. Opposition at 13-17. However, where Mr. Fichtenberg bases his argument on what he believes Congress did not say, the correct result is dictated instead by what Congress did say: "The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate construction, modifications, and operation of radio facilities." Conference Report, supra at 209 (emphasis added). Thus, as discussed above, the Conference Report makes it clear that the Commission may preempt this area.

The Opposition asserts that the Petition may have misquoted South Carolina Public Service Authority v. FERC, 850 F.2d 788 (D.C. Cir. 1988), in that it may have mistaken that court's reiteration of the Commision's argument for a finding that it "might be willing to believe that Congress's silence permits the [Commission] . . . the power to specify a rule of liability governing its licensees if it were essential to achieving the goals of the Act." No such mistake is made. While the court may have been skeptical as to the broad applicability of the Commission's reasoning in that particular case, calling it "improbable and intrusive," (Id. at

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[5]The danger of such conflicting State and local regulations is real, as demonstrated by the October 18, 1996 Reply Comments of Holly Fournier, wherein the authors admonish that in smaller jurisdictions, a few people can "make a difference." In the Connecticut\New York example mentioned above, a small group of individuals in Bridgeport, Connecticut could force licensees in New York City to reduce their power to the point of no longer being able to serve the City limits.

[6]476 U.S. 365 (1986).

793) one can at the very least interpret the Court's unwilling review as reluctant acceptance of a position too strong to ignore.

Mr. Fichtenberg argues that Louisiana Public Service Comm'n v. FCC, supra, requires that a state law must actually exist in order to establish that it is an obstacle to Congress's objectives and thus a candidate for preemption. However, a closer reading of Louisiana reveals that there are other justifications for preemption. For example, "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within its scope of Congressionally delegated authority may pre-empt state regulation," Id. at 369. As mentioned above, the Court did not uphold preemption in that particular case because the rules in question could be divided on an interstate/intrastate basis (unlike RF regulation).

Mr. Fichtenberg asks too much of Section 253 of the Act when he claims that it grants plenary authority of the states over the provisions of Section 704. General principles of statutory construction would suggest caution in applying the provisions of one title of an act to those of another title. Section 253 is not a blanket grant of authority to the states, as the Opposition suggests. Instead, it is a limit of the authority of the Federal government to preempt states in the specific area of market entry barriers. One must look to Section 704 itself (and the legislative history supporting it), as well as Section 4(i) of the Communcations Act, to determine the proper role of the states in relation to the Commission.

Mr. Fichtenberg cites Palmer v. Liggett Group, Inc., 825 F.2d 620 (1987), to support his contention that preemption is only justified when the harm is actual, not potential. Opposition at 19. However, the harm to be suffered in this case is the mere "barrier to entry" that is prohibited by Section 253 of the Act, and it is not necessary to actually witness denial of entry or flight from the market. It is well within the expertise of the Commission to

determine that non-uniform tort liability laws pose barriers to entry, and thus are per se harmful as being against the public policy embodied in the Act.

Mr. Fichtenberg's discussion of Palmer stands as an interesting example of how differing viewpoints will color the interpretation of a judicial holding. If Mr. Fichtenberg is arguing that the holding in Palmer is that a state law may be preempted if it too greatly disturbs a Congressionally declared scheme, Ameritech is in full agreement. However, we are strongly at odds over his definition of what comprises the "Congressionally declared scheme" that the 1996 Act represents. Mr. Fichtenberg believes that the scheme is one of granting states broad powers to protect the public safety. Fichtenberg at 19. However, the Congressionally declared scheme in the preamble of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies." Regulation is not reduced, prices are not lowered, and new technologies are not rapidly deployed in an environment of inconsistent regulation.

II. The Commission Should Establish A Federal Rule Of Liability

The Opposition advances essentially the same arguments against a Federal rule of tort liability as the arguments made against preemption over radio operations. For the same reasons discussed above, these arguments are unpersuasive. Because radio waves cross State and local boundaries, a single radio operation in New York City could trigger Tort claims in three or four different States, with each State applying a different RF standard. The conflict of law issues could prove paralyzing to the process. Thus, allowing multiple tort liability standards would create a situation where "state law disturbs too much the congressional declared scheme,

. . . [and state law therefore] will be displaced through force of preemption." Opposition at page 19 (citing Palmer v. Liggett Group, Inc., supra at 621).

Moreover, a Federal rule of liability would not eliminate the possibility of a tort claim as an incentive for the industry to research and comply with new RF standards. Licensees could still be sued under a Federal rule of liability. However, such suits would be brought under a common standard, which would allow licensees to know the potential for liability in advance, and to avoid such liability by complying with Federal standards. Such outcome is not only fair, it also promotes the development of the telecommunications industry, with all of the related benefits acknowledged by Mr. Fichtenberg and the State of Washington. Opposition at pages 1-2.

Conclusion

In light of the foregoing, Ameritech requests that the Commission clarify its preemption over radio operations, and establish a Federal rule of liability.

Respectfully submitted,
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Filed: October 23, 1996

CERTIFICATE OF SERVICE

I, John A. Prendergast do hereby certify that I have, on this 23rd day of October, 1996, caused to be served by first class U.S. mail, postage prepaid, a copy of the foregoing Comments to the following:

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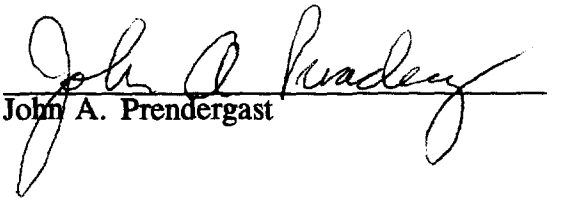

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